

**Recommendations for Actions The Missouri Public Service
Commission Can Implement Informally; Actions Requiring
Formal Commission Action, i.e. Rulemaking; and Recommended
Statutory Changes
Submitted by: Julie L. Noonan**

Introduction

This document provides recommendations for informal and formal action the PSC should take and recommendations regarding statutory changes. While the Roundtable for AO-2008-0192 was convened largely in response to struggles over ex parte contact between key participants in the KCP&L and Aquila merger case before the PSC, there are numerous and significant additional concerns regarding how the Commission and PSC Staff serve the people of the state of Missouri. **Any investigation of the PSC should not be limited in scope to ex parte rules, rather should consider the real and egregious abuses that have occurred related to PSC handling of matters referenced in this document.**

This document has been modified from the original draft presented on January 7th at the Roundtable to include additional information, references, and a correction. At the Roundtable I indicated that there is a possibility that one or more of these recommendations may actually fall into a category other than the category they are aligned with (Informal, Formal, or Statutory Change). Whether or not that is the case, the spirit of the recommendations is to increase public trust, the effectiveness of the Commission, and PSC compliance with the letter, intent, and spirit of the law.

This document includes:

Informal PSC Action Recommendations 1-15:

These recommendations are best viewed as a recommendation to self-impose Standards of Conduct and create a process where an Affidavit is provided associated with each Commission decision indicating that all enumerated Standards of Conduct have been honored and upheld related to the matter at hand. Many of the specific Standards of Conduct are all ready codified and/or included in separate parts of Missouri law, however, have not been honored by Chairman Davis, Commissioner Appling, Commissioner Murray, and/or PSC Staff in proceedings and matters I have repeatedly been impacted by since October 2004.

Formal PSC Action Recommendations:

1. PSC Complaint Support
2. Establishment of an Intervener Fund
3. Concurrence with Office of Public Counsel (and others) on Ex Parte Rule Changes

Statutory Change Recommendations:

1. PSC refrains from supporting or sponsoring changes to the statutes that would make legal that which is illegal
2. Expand Commission membership

Recommendations for Actions the Commission can Implement Informally

Section Summary

The following pages contain specific recommendations for Action that the Commission can and should implement informally. The recommendations are numbered and may contain: 1) The Informal Action Recommendation, 2) Statements in Support, and 3) References to Laws, Rules, Exhibits, Orders, Opinions, Dissenting Opinions, etc. supporting the recommendation.

A short time frame was allotted for preparation of the recommendations prior to the Workshop and Roundtable scheduled for AO-2008-0192. Chairman Davis and Judge Stearley were gracious enough to provide clarification indicating that the case does not conform to all of the formatting and other requirements associated with contested cases considered by the PSC. Even so, I maintain that as a citizen who is not a lawyer and who does not regularly practice before the Commission, I find myself wishing I had more time and resources to prepare and revise these recommendations

The following recommendations are provided as proposed (additional) content for a (the) PSC Standards of Conduct (SOC) that the Commission should formally adopt to provide guidance for the conduct of Commission business. The recommendations are considered informal in that the Commission may self-impose such Standards of Conduct without the need for legislative or rulemaking activity. While there may be additional Standards of Conduct that the Commissioners should consider for inclusion as it supports regulatory responsibilities in addition to regulation of electric power companies, my recommendations stem from experiences related to actions, inactions, and cases related to electric utility regulation. The recommendations include:

SOC Recommendation #1: Adopt PSC Standards of Conduct

- The Commission establishes and formally adopts Public Service Commission Standards of Conduct (SOC) to provide specific guidance for the conduct of the Commission as it supports Commission business.

Statements in support

1. CSR Title 4-DEPARTMENT OF ECONOMIC DEVELOPMENT Division 240-Public Service Commission Chapter 4-Standards of Conduct, Executive Order and Code of Conduct contained therein coupled with other Laws and Rules seek to outline and mandate the appropriate comportment of the PSC and also of those with business before the PSC.
2. While this is necessary and helpful, guidance for conduct and expectations of the Commission is interspersed with conduct and expectations of others and appears prescriptive rather than self-imposed.
3. Further, as a citizen who has been significantly impacted by the actions of a regulated utility and the PSC, it would increase my confidence in the commitment of the Commission to fulfill the letter, spirit, and intent of the law if the Commission created and adopted SOC's that speak only to the conduct and

expectations of the PSC and that include a greater level of specificity by adopting conduct statements (SOCs) that pertain to PSC obligations outlined and/or inferred or mandated by laws and court orders outside of the CSR Title 4 Standards of Conduct.

SOC Recommendation #2: Implement PSC Standards of Conduct Affidavit

- All Commission orders include an affidavit from the Regulatory Law Judge acting as the Hearing Officer that all PSC SOC's were observed and upheld leading up to the issuance of the Commission Order at hand.

Statements in Support:

1. Self-imposed requirement of the PSC Standards of Conduct Affidavit would provide positive and documented assurance to citizens served by the Commission and all who have matters before the PSC that the Regulatory Law Judge acting as Hearing Officer carefully monitors and ensures compliance with the PSC Standards of Conduct.
2. While the current statutes and rules may imply such accountability, and in some cases even prescribe such accountability, the PSC Standards of Conduct Affidavit and the practice of tying the Affidavit to specific actions and orders of the Commission provides affirmative assurance that all SOC's were, indeed, honored by the Commission in the particular matter at hand.
3. In numerous PSC cases related to Aquila since 2005, the PSC has repeatedly extended its authority beyond that which it is granted within the law and applicable rules.
4. Commissioner Davis failed to provide full and fair hearings in EA-2005-0248.

References:

See Appendix C

The following are PSC SOC's are recommendations that should be included within the proposed self-imposed PSC SOC referenced in SOC Recommendation #1 above.

SOC Recommendation #3: Affirmation of PSC Constitutional Public Protection

- The PSC respects citizens' rights and refuses to condone, reward, or act in collusion with regulated entities who subvert citizen rights granted in United States Amendment XIV and the Missouri Constitution, Article I Bill of Rights.

Statements in Support:

The PSC, through inattention to such SOC's has shifted the burden of proof and protection onto the citizenry.

1. Had the Missouri Public Service Commission simply done its job and honored both the letter and the intent of the existing Laws and rules in place, StopAquila.org members, other individuals, governments, and I would not have had to spend the last 3 full years and the next who knows how many years agonizing and arguing in multiple PSC and Court cases to have our Constitutional rights and laws of the State of Missouri upheld.
2. If members of StopAquila.org were able to trust that the PSC were actually upholding both the letter and the intent of the Missouri Constitution, Statutes, Rules of the Department of Economic Development, and Code of Ethics, we would not have to scour the internet and papers to see what unscrupulous moves, posturing, or surprise cases were headed our way. Nor would we feel compelled to take aggressive measures to ensure representation and awareness of local and state legislative agendas to thwart attempts at changing the laws to approve of or provide an exception for an illegally built power plant.

Aquila ratepayers and Missouri Citizens were generally and specifically harmed by the improper adjudication associated with the Aquila South Harper Power Facility, despite numerous improper and/or illegal siting, business and development practices on the part of Aquila.

1. Aquila was desperate to transfer 3 old technology turbines purchased on the unregulated side of their business to the regulated side of the business where they could (and did) request that rate payers help subsidize their past poor management decisions, and take advantage of tax shelter and debt service rates not otherwise available to them. Aquila deprived citizens of property without due process of law through refusal to request Rezoning or a Special Use Permit from Cass County, the local government with jurisdiction of zoning, master planning, and associated permitting and authorization authority. They selected a site, built, and turned up the power plant despite an injunction in record time all in haste to include project costs in the Summer 2005 rate case.
2. The assessed value of my home decreased approximately 20% in 2007. My understanding is that the decreased valuation is a direct result of the proximity of my home (within ½ mile) to the South Harper Peaking Facility. All other homeowners living in close proximity to SHPF also saw significant decline in the assessed value of their property as a direct result of the illegally built power plant.

I present these real and significant statements in good faith after a conversation with Curtis Koons, the Cass County Assessor at the time my property assessment for 2007 was conducted. I have requested and will pursue specific confirmation and other evidence that supports this fact.

References:

The following are excerpts from the WD64985 Opinion:

“By requiring public utilities to seek Commission approval each time they begin to construct a power plant, the legislature ensures that a broad range of issues, including county zoning, can be considered in public hearings before the first spadeful of soil is disturbed. There is nothing in the law or logic that would support a contrary interpretation. Moreover, the county zoning statutes discussed above also give public utilities an exemption from county zoning regulations if they obtain the permission of a county commission, after hearing, for those improvements coming within the county's master plan.(FN14) This strongly suggests that the legislature intended that a public hearing relating to the construction of each particular electric plant, take place in the months *before* construction begins, so that current conditions, concerns and issues, including zoning, can be considered, whether that hearing is conducted by the county or the Commission.”

“The overriding public policy from the county's perspective is that it should have some authority over the placement of these facilities so that it can impose conditions on permits, franchises or rezoning for their construction, such as requiring a bond for the repair of roads damaged by heavy construction equipment or landscaping to preserve neighborhood aesthetics and provide a sound barrier. As the circuit court stated so eloquently, “to rule otherwise would give privately owned public utilities the unfettered power to be held unaccountable to anyone other than the Department of Natural Resources, the almighty dollar, or supply and demand regarding the location of power plants. . . . The Court simply does not believe that such unfettered power was intended by the legislature to be granted to public utilities.”

“**FN14.** Recall that section 64.235 provides “nor shall anything herein interfere with such development or public improvement as may have been, or may hereafter be, specifically authorized or permitted by a certificate of public convenience and necessity, or order issued by the public service commission, *or order issued by permit of the county commission after public hearing in the manner provided by section 64.231.*” (emphasis added).”

See Appendix documentation: missouri_constitution.pdf, EA-2006-0309 Public Hearing Transcript volume 3 (page 106-114, Noonan testimony), PSC Testimony for EA-2006-0309-Julie Noonan.ppt, KC Star Guest Column.pdf, and additional case documentation attached.

Note: During the Roundtable an Aquila representative suggested that I could not make a statement that the value of my home decreased as a result of the power plant being built. I decided not to respond at all to his objection at the Roundtable. Although I do believe that I have sustained specific damage to the value of my home, and also believe that it could be proven at some time, that topic was not the focus of my recommendations. Additionally, I (and others) have suffered many additional losses and inconveniences associated with all of the PSC and court cases about South Harper. Members of StopAquila.org and I have spent thousands of hours on petitions, research, documentation, and other activities all forced upon us by the irresponsibility of Aquila and the PSC. We've sacrificed personal time and resources – initially to preserve – now to restore the peaceful, natural environment that we chose before Aquila disrupted it and now pollutes it with South Harper.

SOC Recommendation #4: Affirmation of PSC Legal Compliance Intent

- PSC honors “the letter of the law and seeks to fulfill the spirit and the intent of the law”, as suggested in 4 CSR 240 Executive Order 92-04. PSC also “shall conduct the business of state government in a manner which inspires public confidence and trust” as suggested in the Code of Conduct.

Statements in Support:

Correction to original document and related testimony:

My initial draft recommendations and presentation before the Roundtable unintentionally attributed statements made by a representative of Aquila to a specific Aquila executive. I did not know the name of the individual that made the statements at the Lyon’s Club meeting in 2004 and thought that I later recognized the individual during PSC proceedings in 2005. I was informed during the Roundtable by Denny Williams of Aquila that the individual I referred to was not the individual that made the statement. Although Mr. Williams suggested to me after the Roundtable who the Aquila representative may have been, I refrain from providing a specific name for this revised document in order to ensure that I do not unintentionally attribute to the wrong individual a second time. It should also be noted that this correction was the first revision I made to this document after the hearing. Failure to post a correction prior to January 30th is attributable only to the fact that my limited personal time does not support completion of all updates to this document prior to the deadline. My intention was and remains that this Correction along with other updates to my document will be submitted by the deadline of January 31st with a request that it replace the original document. I am an honorable person with no malicious or dishonorable intents.

Prior to the deadline for submissions in this case, the incorrectly referenced Aquila executive filed comments with Commissioner Davis stating that, “***Ms Noonan’s allegation is completely false***”. While I agree that it must be true that I attributed the statement of an Aquila executive to the wrong Aquila representative, and I apologize for what I believe is an understandable and unintentional error, ***make no mistake – someone representing Aquila did, indeed, indicate that the PSC preferred that Aquila build the particular plant in the particular location during the 2004 meeting.***

Note:

PSC staff member, Warren Wood, referenced in the following supporting statements has left PSC employment and now serves as the President of MEDA, an association which includes Aquila, Kansas City Power & Light, Missouri Gas Energy, and other utility companies in Missouri. From my first contact with Mr. Wood throughout the many Aquila cases, he appeared to be solely aligned with the interests of Aquila and opposed to providing assistance, information, or consideration to concerns of the public. It was only after the Roundtable that I learned that Mr. Wood now occupies the position of President of an association dedicated to furthering the interests and agendas of utility companies. MEDA was the only entity other than PSC Counsel that offered comments opposing the recommendation of Lewis Mills and others to revise ex parte rules of the PSC. Although I was displeased with and did not trust Mr. Wood during his employment with the PSC, his

acceptance of the President position at MEDA in 2007 makes me even more suspect of his motives and alignment to private utility interests over public interest while employed by the PSC.

1. A representative of Aquila declared at the Lyons Club in Peculiar during the public forum hosted by Aquila in 2004 that the PSC preferred that Aquila build the SHPF plant in this location. If his statement was true, then it appears to this citizen that there was inappropriate discussion and commitment and/or encouragement from the PSC. The statement was made at least two months prior to any case being opened before the PSC in regard to South Harper (similar to Rick Green's communication with the Aquila board regarding characterization of Chairman Davis comments on merger). If it is true, as the Aquila representative declared, that the PSC stated a preference that Aquila build SHPF in the area it currently occupies, then the PSC acted to encourage, support, or commit to something the PSC was telling the public, including me personally, that they had no involvement in. It certainly doesn't inspire my trust if the government tells me they have no involvement in a matter if, in fact, the government is involved in the matter.
2. My first inclination after hearing of the planned power plant and attending the meeting Aquila hosted at the Lyon's Club in 2004 was to engage the PSC by filing a complaint, asking for assistance in impacting the matter, and learning about the PSC's position on the proposed plant. Upon receiving my complaint via the PSC web site and discussing concerns with Warren Wood (PSC Staff), was encouraged to dissuade others from filing similar complaints and was told that any such additional complaints would be routed to me. After initial conversation with Warren Wood covering multiple topics, he and PSC attorney(s) called regarding the Aquila representative's statement that the PSC preferred Aquila build South Harper to say that the PSC doesn't have anything to do with power plants until after they are built.
3. Within a few days of the Circuit Court issuance of the permanent injunction against construction of South Harper, Commissioner Appling met with Aquila employees and toured the site for SHPF. Commissioner Appling visited SHPF on January 14, 2005 and major concrete pouring commenced the next day on January 15, and installation of the three CTs began on March 10, 2005.
4. Not only did PSC staff fail to address my concerns, answer my questions about process, or represent the office in a manner that lead me to believe they were bound to support public interest, it seemed that the PSC wanted to shove their responsibilities off onto me. The statement of the Aquila representative and the visit to the South Harper site of Commissioner Appling after injunction and the day prior to commencement of major concrete pouring give the appearance that the PSC was indeed involved in activities that they told the public they were not engaged in.
5. While the current ex parte rules specify adherence to the rule to during PSC hearings, The Office of Public Counsel, others, and I propose that the *intent* of the law and rules is to provide fair, impartial decision making. I have greater confidence in the PSC's fair and impartial decision making if I am not left wondering what conversations, direction, or intention is expressed outside of

formal business properly considered within formal proceedings and available to all parties.

Reference: See Appendix “EA-2006-0309 CT Installation Chronology”, and “EA-2005-0248 Public Hearing.pdf, pages 173-177 Noonan Testimony

SOC Recommendation #5: Affirmation of PSC Enforcement Pertaining to Site Specific Certificates of Need and Necessity

- The PSC affirms and demonstrates that the Commission respects the Missouri Constitution, the Revised Missouri State Statutes, and the direction within the final WD64985 Opinion of the Missouri Court of Appeals that specifies that a utility must secure a Site Specific Certificate of Need and Necessity prior to disturbing the first spadeful of soil when planning to build or expand power generation facilities. The PSC requires that utilities seeking a Site Specific CNN comply with all applicable local laws, and no Site Specific CNN will be awarded unless the utility provides undisputed (by local governments where such facilities are proposed to be located/expanded) proof of compliance with applicable local laws, ordinances, permitting, zoning, etc.

Statements in Support:

1. The first question I asked at the public forum hosted by Aquila in 2004 was my attempt to ascertain whether Aquila possessed or in the alternative, when they planned to obtain a Site Specific Certificate of Need and Necessity for SHPF. The law indicated that a Site Specific CNN would be required for SHPF, yet Aquila asserted that it did not. The expenditure of thousands of hours, hundreds of thousands of dollars, and multiple cases would have been avoided had all utilities known that the PSC would enforce compliance with the State Statute that requires utilities to secure a Specific CNN PRIOR to building, operating, owning, etc. a power plant.
2. My early discussions with PSC Staff member Warren Wood also included my holding that Aquila could not build without a Site Specific CNN and his assertion that the PSC does not require SS CNNs or have any other involvement in the siting, building, and operation of a new power plant, rather only determines whether related expenses were prudently incurred and whether the utility may recoup such expenses through rates. The law requires and the Western District Appeals Court has confirmed that a Site Specific CNN is required by despite the lack of Commission compliance in recent years. Inclusion of the Affirmation suggested as SOC#5 removes confusion regarding Commission stance and enforcement in this area.
3. Among other concerns with Aquila behavior, early on I confirmed that the zoning of the parcel where Aquila intended to build SHPF would not allow the construction or operation of the proposed facility. I looked forward to the support of my Constitutional rights of due process through the County that is invested with the police powers to create, maintain, and enforce zoning and master planning in unincorporated Cass County where SHPF was built and I reside. Unfortunately, Aquila refused to submit to the appropriate process to request zoning change or Special Use Permit from Cass County. Before the PSC and the courts, Aquila acted as if to do so was a ridiculous and unnecessary act, yet they had done exactly that prior to building Aries, began to do so for the proposed Camp Branch power plant, committed to do so in their agreement with the City of Peculiar, and said they would do so at various times during the SHPF debacle.

- The law also requires and the Western District Appeals Court has confirmed that in this particular instance, Aquila was not exempt from Cass County zoning and permitting. The PSC should never again act as if they are not obliged to require utility compliance to request and obtain local authority, when applicable (acknowledging some areas may not have zoning or other land use requirements).
4. If SHPF is ultimately deconstructed as specifically ordered in the permanent injunction issued prior to the time that Aquila began building, it will certainly be a waste. That waste could have and would have been avoided had the PSC required that Aquila seek and obtain a Site Specific CNN PRIOR to building and had the PSC required that such certificate, if granted, be conditioned as suggested in SOC Recommendation #5. It is my hope that no other citizen or local government never again be subjected to what we've had to endure and fight regarding SHPF. Never should a utility in the State of Missouri be able to decide to do first and ask forgiveness later.

References:

See Appendix: WD64985 Opinion.Doc, EA-2006-0309 STOPAQUILA ORG brief.doc, EA20060309AquilaSG RC Dissent.pdf

SOC Recommendation #6: Affirmation of Full, Fair, and Impartial Hearings

- With the assistance of the Regulatory Law Judge acting as Hearing Officer, the PSC Chairman ensures that all hearings are full, fair, and impartial.

Statements in Support:

1. In EA-2005-0248 in which Aquila requested confirmation that existing Certificates were sufficient to build SHPF or in the alternative, for a Site Specific CNN, Commissioner Davis halted proceedings abruptly in the middle of Cass County cross and prior to allowing StopAquila.org and other interveners to question. All opposed were not allowed to put on any witnesses. I believe that the proceeding was not full, fair, or impartial.
2. Associated with EA-2005-0248, the Commissioner Davis made a statement to the effect that impacted parties should properly be heard in a subsequent rate case. The interpretation was that our concerns and interests were not proper for consideration of the Commission with regard to whether Aquila could or should build, but only after they had done so to argue that Aquila should be burdened with financial repercussions. It is wholly and completely inappropriate to exclude Intervener concerns and information from proceedings regarding CNNs. I would much rather that my rights and the rights of other citizens similarly impacted in this or in future cases be afforded the consideration of inclusion and due process. The suggestion that slap on the offending utility may receive a slap on the wrist after the fact is simply insufficient. In this particular instance, the offending utility didn't even receive a slap. Aquila was financially rewarded for a "phantom" power plant and "non-existent power generation".
3. In EA-2006-0309, Commissioner Murray was questioning PSC Staff member Warren Wood and asked if Aquila had to dismantle the all ready built SHPF and Aquila ran out of power, that Cass County should be the first to forgo having power. I was shocked and appalled at the suggestion that implied that because Cass County was properly asserting their responsibility to uphold the laws and protect Cass County citizens, that they should be punished if a power shortage should occur. This was only one of multiple instances that it appeared a Commissioner or PSC Staff was advocating on behalf of Aquila and displaying partiality.

References:

See Appendix: Footnote 12 in WD64985 Opinion.doc, Aquila psc stopaquila.app for rehearing...doc, EA-2005-0248 Gaw Dissent.pdf, final paragraph in EA-2005-0248 Concur Opinion Jeff Davis.pdf, pages 0841-0844 in ea20060309 v7 Transcript.pdf

SOC Recommendation #7: Affirmation of Applicant Burden of Proof

- The PSC ensures that the burden of proof for Need & Necessity and other requested orders from the PSC is upon the Applicant and NOT on interveners.

Statement in Support:

1. In AO-2006-0309, the majority of the PSC improperly shifted the burden of proof to Intervenors as discussed in the Dissenting Opinion of Commissioners Robert M. Clayton III and Steve Gaw. Commissioner Appling's Concurring Opinion also confirms that the burden was shifted from Aquila to others by stating that "... there is no compelling reason to deny the company's request for a certificate of convenience and necessity".
2. Although the Regulatory Law Judge stated up front that the burden of proof would be upon Aquila, it seemed that during the entire proceeding, the Commission majority and staff sided with Aquila and asked intervenors to disprove Need & Necessity and/or Aquila's site selection without even confirming what process the Commission would ultimately use.

References:

See Appendix: EA-2006-0309AquilaSG and RC Dissent.pdf, EA-2006-0309 Concurring Opinion Appling.pdf, all additional 0309 case information and WD64985 documentation

SOC Recommendation #8: Affirmation of PSC and/or Independent Evaluation of Applicant Claims

- The PSC ensures that staff and/or others independently examine all Applicant claims relative to least cost options and insist upon adherence to least cost options unless there is a competing objective of decreased dependence on generation utilizing fossil.

Statements in Support:

1. Throughout PSC cases and court cases, it often appears that PSC staff fails to exercise independent judgment and evaluation of Aquila claims.
2. After the WD64985 Opinion, members of PSC legal staff continued to rely on Aquila representations as gospel and parroted interpretations of the Harline case that were declared erroneous and false by the Court of Appeals specifically pertaining to the matter at hand.
3. Evidence was presented that building South Harper was not the least cost option available to Aquila, yet staff demonstrated unwavering support in an attempt to legitimize the illegally built power plant.
4. Rather than encourage Aquila to take the least cost option, staff advocated an option that would unnecessarily burden rate payers by the cost alone, not even to mention the additional exposure that could and may yet result if the permanent injunction takes effect and the plant is dismantled at a cost Aquila claims to be approximately \$20 million. How can such a position be considered responsible for a government entity charged with “ensuring Missouri consumers have access to safe, reliable and reasonably priced utility service..”?

References:

See Appendix “ER-2005-0436 Purchase Power Cheaper Testimony.pdf”

SOC Recommendation #9: Affirmation of PSC Public Protection in matters of Long Term Planning and Ratemaking

- The PSC must ensure that utilities make continual progress toward implementing long term planning to reduce customer exposure to fossil fuel volatility and that reflects appropriate mix between types of power generation.

Statements in Support:

1. Throughout PSC cases affiliated with South Harper, it was clear that information presented by Aquila and rubber stamped by staff sought only to justify keeping the already built South Harper plant, not to evaluate whether build of peaking power generation was needed and/or aligned with appropriate generation mix planning.
2. Evidence presented in EA-2006-0309 indicated that what Aquila needed was increased base and intermediate power, not peaking power generation.
3. Aquila divested itself of other more suitable and cost effective assets and purchase power agreements immediately preceding the “emergency need” to quickly build South Harper. Again, peaking power was NOT needed to ensure reliable, reasonably priced power. Build of South Harper actually increased rate volatility by increasing reliance on gas fired generation.
4. Affiliate possession of out dated gas turbines that would likely not be sought out for purchase by others (due to old and inferior technology) and was not able to be recouped through rate treatment should NEVER be allowed to eclipse appropriate generation mix planning.
5. The PSC is charged with regulating utilities which are granted monopolies. If the PSC were truly serving the best interests of the public and rate payers, the PSC would ensure that actions and decisions of the regulated utilities helped fulfill appropriate goals from long term planning, reduces exposure to fossil fuel volatility, and aligns with appropriate mix between types of power generation.

References:

See Appendix “STOPAQUILA PUBLIC version Brief Ct Appeals 2 6 07.pdf” and referenced transcripts available on MPSC EFIS.

Excerpt from brief:

“Prior to the beginning of construction on the SHPF, the PSC Staff indicated that Aquila needed more base load facilities (i.e., coal powered facilities) and that it had too much peaking. (The SHPF is a peaking plant.) Transcript Vol. 5 p. 681 line 17 to p. 684 line 13, Transcript Vol. 11 p. 1737 line 5 to p. 1738 line 24, Exhibit 82, Transcript Vol. 3 p. 307 line 5 to 11, Transcript Vol. 5 p. 681 line 17 to p. 684 line 13, Transcript Vol. 3 p. 290 line 5 to p. 290 line 17. Exhibit 38,

created in 1999, shows Aquila had 125 megawatts (MW) too much in peaking, 57 megawatts too little in intermediate, and 67 MW too little in base. Transcript Vol. 3 p. 307 line 5 to 11.”

NOTE: Additional information is available in the non-public version of the record due to discussion of “highly confidential” information. Transcripts referenced that are not included in the Appendix of this document are available on the MPSC EFIS web site.

SOC Recommendation #10: Affirmation of PSC Commitment to Approve Rate Inclusion Limited to Actual Facilities and Generation that are Used and Useful

- The PSC only considers and contemplates approval of reasonable expenses, prudently incurred for actual facilities that are both used and useful.

Statements in Support:

1. In ER-2005-0436, the PSC considered expenses incurred by Aquila related to SHPF. At the time of the decision, the facility had 3 turbines, was not operating, and had a permanent injunction against its construction and operation. The injunction also specified that any improvement inconsistent with agricultural zoning would have to be removed.
2. In the same case, the PSC also considered expenses for non-existent generation. Aquila had 3 turbines at South Harper, which was the actual plant referenced as “hypothetical” but the rate case considered 5 turbines.
3. I suggest that all expenses incurred by Aquila in the construction of SHPF after the injunction was ordered by the Circuit Court were imprudently incurred. How can anyone, much less the Commission that is charged with protecting the public interest, consider expenses to build a power plant that has been decreed illegal to build and that will be dismantled by court order PRUDENTLY incurred expenses?!?!? Although the Circuit Court allowed Aquila to post a bond to stay the injunction pending Appeal, the injunction was and remains in place. It was in place during all PSC cases regarding SHPF and may yet be enforced.

Reference:

The following is an excerpt from Commissioner Steve Gaw’s Dissenting Opinion in ER-2005-0436.

Non-used and Non-existent Generation Units

“This agreement places in rate base a gas-fired combustion turbine generating facility with around 500 MW of capacity. Approximately 300 MWs are based upon what Staff deems to be prudently incurred costs of the South Harper facility. An additional 200 MWs more or less represent what Staff believes would be the prudently incurred cost of adding an additional two combustion turbines to that same location.

Case No. ER-2005-0436

TariffNo. YE-2005-1045

Section 393 .135 RSMo 2005 states:

Any charge made or demanded by an electrical corporation for service, or in connection therewith, which is based on the costs of construction in progress upon any existing or new facility of the electrical corporation, or any other cost associated with owning, operating, maintaining, or financing any property before it is fully operational and used for service, is unjust and unreasonable, and is prohibited. This section was established by initiative petition in 1976. Also known as Proposition One, it was adopted at a time when many in the state were upset with increasing utility rates caused in part by construction costs of new plants being passed on to

consumers prior to the plants being used and useful and without the scrutiny of the prudence of those costs that after the fact reviews bring.

In this case the South Harper facility does not appear to meet the requirements of §393.135. After months of litigation as to its siting and operation, the Cass County Circuit Court has ordered the plant shut down and has slated it for deconstruction. While it is possible that authority could be received from either Cass County or the Missouri Public Service Commission that would change the outcome of the future operation of this facility, it is clear that at the time of this decision the facility is not and cannot be used for service as required by law. Yet the parties to the Stipulation have attempted to create a new mechanism for accomplishing exactly the same result in rates and rate base as would occur if the facility were fully operational. Furthermore, the Stipulation adds two more units that do not exist and places them in rate base as well.

Therefore, this Order provides for the inclusion of some facilities that are not used and useful and it includes others that do not exist at all.

This Order sets a precedent which in effect erases §393.135. As stated, the legal logic used places a phantom plant in Aquila's rate base to account for the South Harper facility which cannot be in rate base and includes additional fictional generation as well to replace an expiring contract for generation at the Calpine-owned Aires plant. Why can't this same logic be used in any case before the Commission to place any surrogate plant in rate base that may be contemplated or under construction even though the actual facilities could not be in rate base under law? Some might argue that in light of Aquila's situation with the South Harper facility it is understandable that the parties would attempt to be inventive in assisting Aquila out of its selfmade predicament. But, this Commission cannot ignore the law nor should it set such a precedent."

SOC Recommendation #11: Affirmation of PSC Regulation of Regulated Utility Asset Disposal

- The PSC ensures that no utility is granted an order authorizing it to “sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, works or system, necessary or useful in the performance of its duties to the public, nor by any means, direct or indirect, merge or consolidate such works or system, or franchises, or any part thereof, with any other corporation, person or public utility, without having first secured from the commission an order authorizing it so to do.”

Statements in Support:

1. In EO-2005-0156, Aquila asked to transfer and leaseback assets AFTER Aquila had all ready completed the transaction.
2. It appears to this citizen that the law requires request and authorization PRIOR to such action. Furthermore, the law indicates that transactions that do not comply with the law specifies that unlawful transactions are void.
3. As in other areas of concern, the Commission majority rewarded Aquila for illegal and inappropriate behavior.
4. In addition to the fact that Aquila entered the agreement prior to requesting and receiving Commission approval, Aquila testified as if the transaction had not yet transpired.
5. Again, it is totally unacceptable to act first and ask forgiveness later. These acts subvert the law and regulation by the PSC. The PSC should not continue to reward such behavior.

Reference:

Excerpt from EO-2005-0156 Dissent of Commissioners Robert M. Clayton III and Steve Gaw:

It is clear from the foregoing discussion that the CTs used in the South Harper Generation Facility were considered necessary by Aquila in the performance of Aquila's duties to the public. The necessary nature of these assets is admitted by Aquila in its Application as well as in its pending rate proceeding. As such, Section 393.190 specifically prohibits any sale, assignment, lease, transfer, mortgage or other encumbrance without the prior approval of the Commission. The record indicates that Aquila executed, in December of 2004, a Bill of Sale providing for the transfer of all of Aquila's rights, title, and interest in the South Harper CTs. Recognizing that Aquila had not yet obtained the approval of the Commission, this transaction is necessarily void. No amount of accounting or legal gymnastics can correct this legal deficiency.

Finally, these Commissioners wish to note that nothing in this Order makes reference to the questionable handling of information relating to this case by Aquila. It is apparent that the Company has been less than forthright with the Commission. Specifically, we note: (1) Aquila never voluntarily disclosed to the

Commission that the December 2004 transfer occurred ; (2) Aquila's failure to provide executed copies of the relevant documents; (3) Aquila's use of the future tense in its pleadings and testimony in describing a transaction that had already occurred; (4) Aquila's claims that the Commission should have been aware of the executed transaction based upon public statements by the Mayor of Peculiar in a different proceeding, despite Aquila's principal witness denying he was aware of the December 2004 transaction at the time of the September 21, 2005 hearing; and (5) Aquila's failure to address Commissioner inquiries at the hearing or to correct the Commission and the parties' belief that the transaction had not yet occurred. Explanations by counsel and Aquila's witness were not satisfactory and proved elusive, vague and questionable. Nowhere in the majority's Order is Aquila admonished for its representations or omissions. As such, it appears that such lack of candor is acceptable practice before this tribunal. Such representations and omissions deserve further inquiry from the Commission for possible future action.”

SOC Recommendation #12: Affirmation of PSC Freedom from Outside Influence

- The PSC avoids any interest or activity which improperly influences, or gives the appearance of improperly influencing, the conduct of official duties. In addition to the familial relationships specified within the law, any Commissioner or Regulatory Law Judge who has a personal relationship with a representative or member of an Applicant recuses themselves from all cases that involve that Applicant in order to ensure fair and impartial decision making by the Commission.

Statements in Support:

- As referenced in prior SOC recommendations, the PSC staff repeatedly counseled me and others verbally and in writing that the PSC has nothing to do with power plants until after they are built and then, only to determine whether they may recoup costs through rate increase/authorization.
- At the same time that they denied involvement and stated that they “could not tell them where not to build”, it appeared that the PSC was very involved with decisions and/or counsel to Aquila regarding South Harper.
- A representative of Aquila announced in the initial public meeting in 2004 that the PSC *preferred that Aquila build South Harper peaking plant at that location*. While the statement of the Aquila representative was discounted by PSC staff, there was and remains a strong sense that the PSC was involved in matters that they professed no involvement in. This type of behavior does nothing to build public trust and confidence, rather destroys any confidence or trust.
- Reasonable people would not believe that it was mere coincidence that major concrete pouring for South Harper commenced the day after Commissioner Appling’s visit to South Harper only a few days after the permanent injunction.

References:

Policy Section: C-12

Representation of Independence

In order to maintain the public trust, the Public Service Commission (PSC) and its employees must be independent, both “in fact” and “in appearance”, of those entities regulated by the PSC and those parties appearing before the Commission in any PSC proceeding.

See Appendix “EA-2006-0309 CT Installation Chronology-DOC071207.pdf”

SOC Recommendation #13: Affirmation of PSC Compliance with Limitation of Powers

- The PSC refrains from extending powers beyond that which are specifically bestowed on the Commission by Missouri State Statutes.

Statements in Support:

1. Missouri law does not give the PSC the authority to authorize transfer of assets AFTER the transaction has occurred, rather must authorize PRIOR to the transaction. In EA-2005-0156, the PSC authorized a transaction after it occurred after Aquila presented requests and testimony as if the transaction had not yet occurred. Even when the truth came to light, the majority rewarded Aquila's false representations and illegal behavior in place of upholding the law and declaring the transaction void.
2. Missouri law requires that a Specific Certificate of Need and Necessity be granted for each specific power plant proposed prior to construction, yet the majority of the PSC attempted to extend their powers and collaterally attack the rights of another government entity by claiming that they needn't provide a Specific CNN. The majority claimed that a certificate allowing a predecessor company to generally provide power and string power transmission lines in a territory satisfied the CNN requirement.
3. Missouri law does not give the PSC the authority to authorize the construction, operation, maintenance, etc. of a power plant AFTER the plant is built, rather PRIOR to construction only. The majority of the PSC granted a Specific CNN to Aquila over a year AFTER the plant was constructed. All construction occurred AFTER a permanent injunction was issued stating that any improvement that was inconsistent with Agricultural zoning would have to be dismantled if Aquila failed to overturn on appeal. Aquila had failed to overturn on appeal and yet the majority of the PSC
4. 4 CSR 240-2.180 Rulemaking that applies to the Commission requires that the PSC must engage in a formal process to create or change the Rules by which the Commission operates. It does not provide the Commission support for making up the rules as they go during a case or for making up rules and processes to be used for one case only and suggesting that the rules and processes should not apply for future cases. In EA-2006-0309, the Commission failed to tell parties what process would be used to make a determination in the case. PSC staff Warren Wood created a new process and presented the process during the hearings to be applied only to the South Harper Site Specific CNN request. The process and proposal were unfair and unsupported by the law and Standards of Conduct.

References:

See 4 CSR 240-2.180 Rulemaking, see Warren Wood testimony in EA-2006-0309, See Appendix Dissent of Commissioners Robert M. Clayton III and Steve Gaw in "EA20060309AquilaSG RC Dissent.pdf"

4 CSR 240

Code of Conduct

1. Executive branch employees shall conduct the business of state government in a manner which inspires public confidence and trust.
F. Employees of the State are expected to comply with the statutes of Missouri at all times.
2. Executive branch employees shall conduct themselves in scrupulous compliance with applicable federal, state and local law.
B. Employees shall adhere to all laws providing equal opportunity to all citizens.
C. Employees shall perform their responsibilities as they are specified in law or other authority establishing those responsibilities.

SOC Recommendation #14: Affirmation of PSC Reliance on Established Processes

- The PSC relies solely on processes outlined and authority granted in the law, PSC Rules, and those which emanate from the law and are agreed to and understood by all parties in a matter.

Statements in Support:

1. Allowed Aquila the bond agreement and transfer of assets even though Aquila “asked” permission from the PSC AFTER the transaction had taken place. The law¹ is unquestionably clear that Aquila should have had to have the approval of the PSC PRIOR to entering into such an agreement. The law even specifies that any transaction is void if the utility does not obtain PSC approval PRIOR to such transfer of assets and/or indebtedness. (PSC Case: EO-2005-0156)
2. After the injunction, in EA-2005-0248, Aquila asked the PSC for Confirmation that their existing Certificates were sufficient to build South Harper or for a Specific CNN if confirmation wasn’t granted. Chairman Davis stopped proceedings abruptly in the middle of Cass County cross examination and without letting StopAquila and others provide evidence and issued a ruling. Even though the laws² are clear that utilities should seek a Specific CNN for each power plant prior to construction, the PSC majority said that the original certificate from the grant of the area service territory was all that was required. That ruling was soundly and finally rejected (twice) by the Missouri Court of Appeals (WD64985). The Appeals court scolded the PSC for failing to do their job as specified in the statutes in the Opinion.
3. In EA-2006-0309, PSC staff created a new process to be used in determining whether a CNN should be granted for the all ready built SHPF. The process was introduced, but not confirmed as the process that would be used by the Commissioners to make the determination until issuance of the Report & Order.
4. The process, created by PSC Staff member Warren Wood, relegated zoning and/or permitting to a status that was a discardable factor. Clearly, multiple interveners were at a huge disadvantage in preparing for and participating in a case where the PSC failed to outline the process for decision making in the matter prior to the time that the Report & Order was issued.
5. The process referenced was also recommended as a process to be followed only for the SHPF and not used for any future CNN cases. Public trust is not enhanced by failing to inform all parties of the criteria for decision making or by making up the rules as you go.

References:

1

Transfer of franchise or property to be approved, procedure--impact of transfer on local tax revenues, information on to be furnished, to whom, procedure.

393.190. 1. No gas corporation, electrical corporation, water corporation or sewer corporation shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, works or system, necessary or useful in the performance of its duties to the public, nor by any means, direct or indirect, merge or consolidate such works or system, or franchises, or any part thereof, with any other corporation, person or public utility, without having first secured from the commission an order authorizing it so to do. Every such sale, assignment, lease, transfer, mortgage, disposition, encumbrance, merger or consolidation made other than in accordance with the order of the commission authorizing same shall be void. The permission and approval of the commission to the exercise of a franchise or permit under this chapter, or the sale, assignment, lease, transfer, mortgage or other disposition or encumbrance of a franchise or permit under this section shall not be construed to revive or validate any lapsed or invalid franchise or permit, or to enlarge or add to the powers or privileges contained in the grant of any franchise or permit, or to waive any forfeiture. Any person seeking any order under this subsection authorizing the sale, assignment, lease, transfer, merger, consolidation or other disposition, direct or indirect, of any gas corporation, electrical corporation, water corporation, or sewer corporation, shall, at the time of application for any such order, file with the commission a statement, in such form, manner and detail as the commission shall require, as to what, if any, impact such sale, assignment, lease, transfer, merger, consolidation, or other disposition will have on the tax revenues of the political subdivisions in which any structures, facilities or equipment of the corporations involved in such disposition are located. The commission shall send a copy of all information obtained by it as to what, if any, impact such sale, assignment, lease, transfer, merger, consolidation or other disposition will have on the tax revenues of various political subdivisions to the county clerk of each county in which any portion of a political subdivision which will be affected by such disposition is located. Nothing in this subsection contained shall be construed to prevent the sale, assignment, lease or other disposition by any corporation, person or public utility of a class designated in this subsection of property which is not necessary or useful in the performance of its duties to the public, and any sale of its property by such corporation, person or public utility shall be conclusively presumed to have been of property which is not useful or necessary in the performance of its duties to the public, as to any purchaser of such property in good faith for value.

2. No such corporation shall directly or indirectly acquire the stock or bonds of any other corporation incorporated for, or engaged in, the same or a similar business, or proposing to operate or operating under a franchise from the same or any other municipality; neither shall any street railroad corporation acquire the stock or bonds of any electrical corporation, unless, in either case, authorized so to do by the commission. Save where stock shall be transferred or held for the purpose of collateral security, no stock corporation of any description, domestic or foreign, other than a gas corporation, electrical corporation, water corporation, sewer corporation or street railroad corporation, shall, without the consent of the commission, purchase or acquire, take or hold, more than ten percent of the total capital stock issued by any gas corporation, electrical corporation, water corporation or sewer corporation organized or existing under or by virtue of the laws of this state, except that a corporation now lawfully holding a majority of the capital stock of any gas corporation, electrical corporation, water

corporation or sewer corporation may, with the consent of the commission, acquire and hold the remainder of the capital stock of such gas corporation, electrical corporation, water corporation or sewer corporation, or any portion thereof.

3. Nothing herein contained shall be construed to prevent the holding of stock heretofore lawfully acquired, or to prevent upon the surrender or exchange of said stock pursuant to a reorganization plan, the purchase, acquisition, taking or holding of a proportionate amount of stock of any new corporation organized to take over, at foreclosure or other sale, the property of any corporation whose stock has been thus surrendered or exchanged. Every contract, assignment, transfer or agreement for transfer of any stock by or through any person or corporation to any corporation in violation of any provision of this chapter shall be void and of no effect, and no such transfer or assignment shall be made upon the books of any such gas corporation, electrical corporation, water corporation or sewer corporation or shall be recognized as effective for any purpose.

(RSMo 1939 § 5651, A.L. 1967 p. 578, A.L. 1984 H.B. 1477 § 393.190 subsecs. 1, 3, 4)

Prior revisions: 1929 § 5195; 1919 § 10483

(2001) Section is not preempted by the Securities and Exchange Act or the Public Utility Holding Company Act and does not violate the dormant Commerce Clause. *Southern Union Co. v. Missouri Public Service Commission*, 138 F.Supp.2d 1201 (W.D.Mo.).

(2002) Requirement that regulated gas corporation obtain Commission approval before purchasing stock of out-of-state utility companies, where non-specific application for blanket approval of such purchases had been denied, is not a per se violation of the Commerce Clause. *Southern Union v. Missouri Public Service Commission*, 289 F.3d 503 (8th Cir.).

2

Approval of incorporation and franchises--certificate.

393.170. 1. No gas corporation, electrical corporation, water corporation or sewer corporation shall begin construction of a gas plant, electric plant, water system or sewer system without first having obtained the permission and approval of the commission.

2. No such corporation shall exercise any right or privilege under any franchise hereafter granted, or under any franchise heretofore granted but not heretofore actually exercised, or the exercise of which shall have been suspended for more than one year, without first having obtained the permission and approval of the commission. Before such certificate shall be issued a certified copy of the charter of such corporation shall be filed in the office of the commission, together with a verified statement of the president and secretary of the corporation, showing that it has received the required consent of the proper municipal authorities.

3. The commission shall have the power to grant the permission and approval herein specified whenever it shall after due hearing determine that such construction or such exercise of the right, privilege or franchise is necessary or convenient for the public service. The commission may by its order impose such condition or conditions as it may deem reasonable and necessary. Unless exercised within a period of two years from the grant thereof, authority conferred by such certificate of convenience and necessity issued by the commission shall be null and void.

See Appendix Dissent of Commissioners Robert M. Clayton III and Steve Gaw in “EA20060309AquilaSG RC Dissent.pdf” and WD64985 Opinion

Recommended Actions Requiring Formal Commission Action (i.e. Rulemaking)

Section Summary

Two recommendations are provided for formal action by the Commission. The intent of both recommendations is to increase access and support for citizens who are impacted by regulated utilities. In addition, I offer concurrence with Office of Public Counsel Ex Parte Rulemaking recommendations and a suggestion that could lessen the financial impact of the recommendation.

Concurrence with Office of Public Counsel Ex Parte Rulemaking Recommendation:

As stated in the Roundtable, I concur with Lewis Mills (and other's) recommendation to modify ex parte rules as reflected in the recommendation after any agreeable modifications are made by Mr. Mills. Further, it appeared during Roundtable discussion that one of the primary concerns of implementing the recommendation was the financial impact of expenses related to increased demand for court reporter documentation and transcription of conversations that would have to be recorded and made available to interested parties. I offered that the financial impact would be greatly reduced if the Commission would leverage technology. My specific suggestion was that all such conversations could be electronically recorded and posted to EFIS as audio files (e.g. “.wav” files). Electronic capture and presentation of such conversations could provide full visibility to all interested parties without significant increased expense related to court reporting and transcription.

Formal Commission Action Recommendation #1: PSC Complaint Support

Create and enforce a rule directing PSC Staff to:

- a) Ensure that PSC rules for filing both Informal and Formal Complaints are posted on the PSC web site in conjunction with the complaint form that currently is located at: <http://psc.missouri.gov/ComplaintForm.asp>.
- b) Ensure that the form referenced in a) above does not provide an impression that acceptable complaints are limited to billing or personal utility consumption issues.

- c) In addition, the rule directs PSC Staff to offer the same information about rules for filing both Informal and Formal Complaints to anyone who contacts the PSC through other avenues intending to make a complaint.
- d) The web site and PSC Staff clearly inform individuals desiring to file an informal complaint that if they are not satisfied with the response, they may file a formal complaint to seek satisfactory resolution.
- e) Within the same or in a separate rule, the Commission directs PSC Staff to provide full disclosure, information, and assistance to citizens and other governmental agencies that seek information relevant to the processes, rules, and business and of the PSC.

Statements in Support:

- 1. The PSC web site is an important and helpful asset of the PSC, however, citizens and other entities might conclude from the current Complaint Form that complaints are limited to matters pertaining only to individual impacts related to billing or service suspension practices of utilities.
- 2. Creation of the PSC Complaint Support rule helps insure that those who desire to make a complaint feel welcome to make any complaint that they reasonably believe to within the authority of the PSC to receive and consider.
- 3. The recommended rule also ensures that, regardless of whether one contemplates or attempts to file a complaint online, through conversation with PSC Staff, or by other means, that all parties understand that they may also file a formal complaint if they are not satisfied with the PSC Staff response.
- 4. Commission direction to staff as outlined in e) above acknowledges that the processes, rules, and business of the PSC are complex and difficult, if not impossible to understand and interact with for parties not customarily involved in PSC business. Since the PSC exists to serve the citizens, this provision ensures that PSC staff understands, respects, and supports an obligation to assist other governmental agencies and citizens upon request.

Formal Commission Action Recommendation #2: Establishment of Intervener Fund

Create and enforce a rule modeled off of a concept contained within New York State Law that establishes an account funded by the Applicant for the purpose of defraying the cost of representation for local interveners (governmental bodies that are not the Applicant and other local parties).

Statements in Support:

1. While the business of the PSC is conducted in what is described as a “quasi-judicial” setting, conduct of hearings and other business before the PSC is very formal and the financial implications to those impacted by Applicant requests for Certificates, Ratemaking, and other Orders of the PSC are significant.
2. The cost of participation is such that many who are impacted by actions and requests of entities regulated by the PSC may not be able to participate. Those that do proceed with participation may be significantly limited in their ability to engage experts and retain legal counsel representation in all pertinent matters and proceedings.
3. I understand and appreciate that the Office of Public Counsel is available to support public interest in proceedings before the PSC, however, OPC engagement and support is geared toward the broadest public interest and not to entities or individuals most specifically and locally impacted.
4. Although some neighbors of SHPF have made payments to StopAquila.org attorney, Gerry Eftink, over the past 3 years and Aquila made one payment, I receive a monthly bill that is currently over \$35,000. In the coming months, that bill will likely increase.
5. It is unreasonable for individuals, groups of citizens with local impact, and local governments to be excluded from appropriate representation in matters before the PSC. Since such requests are made to benefit the Applicant, it should be incumbent on the Applicant to provide funding support to local parties with perceived specific local impact.

Reference

The following is an excerpt from New York State, PBS, Article 8, section 142. This outlines the practice of establishing and administering a fund for interveners. Submission of a specified amount to the fund is required with application for a certificate to build a power plant.

“6. (a) Each application shall be accompanied by a fee of one hundred fifty thousand dollars to be used to establish a fund (hereafter in this section referred to as the "fund") to be disbursed at the board's direction, to defray expenses incurred by municipal and other local parties to the proceeding (except a municipality which is the applicant) for expert witness and consultant fees. The board shall provide transcripts, reproduce and serve documents, and publish required notices, for municipal parties. Any monies remaining in the fund, after the board has issued its decision on an application under this article and the time for applying for a rehearing and judicial review has

expired, shall be returned to the applicant.

- (b) The one hundred fifty thousand dollar fee required by paragraph (a) of this subdivision shall be deposited in one or more separate accounts in one or more banks of the board's choosing insured by the federal deposit insurance corporation. Notwithstanding any other provision of law to the contrary, the board shall provide by rules and regulations for the management of the fund, for disbursements from the fund, and for the proper auditing of monies in the fund, which rules and regulations shall be consistent with the purpose of this section to make available to municipal parties up to seventy-five thousand dollars from such fund for uses specified in this section. In addition, the board shall provide other local parties up to seventy-five thousand dollars, provided however, that the board shall assure that such funds are made available on an equitable basis in a manner which facilitates broad public participation.

My recommendation is that a similar fund be established in Missouri for cases where Applicant requests a Certificate, Rate Change, Merger, or other impacting Order of the Commission. I also recommend that the Missouri law specify that the funds may be used for legal representation, expert witness, and consultant fees and that the total per application be a specified amount that is likely to be sufficient to significantly defray the majority of costs likely to be incurred by interveners. Although I am not certain what entity is being referenced when "the board" is referred to in this portion of the NY law, my suggestion is that a similar Missouri law specify a government agency establish and provide over sight of and disbursements from the fund.

Recommended Statutory Changes

Section Summary

In addition to the recommendations for Informal and Formal Action by the PSC, I offer two recommendations relative to Statutory Changes. The first recommendation is actually a request to refrain from changing laws currently in place to protect the interests of the citizens of Missouri. The second recommendation is offered to increase the Commission's ability to better handle what appears to be an extensive case load and mandate reasonable accountability of Commission participation in each case in order to qualify them to vote on a disposition of the case.

Recommended Statutory Change #1: PSC Refrains from Sponsoring or Supporting changes that Legalize that which is Illegal

Statements in Support:

1. My primary concern and recommendation related to initiating Statutory Changes is that the PSC does not engage in sponsoring or supporting any change in Missouri State Statutes that would result in attempting to legalize that which is illegal today. In making this recommendation, I intend that this recommendation also include refraining from sponsoring or supporting any changes to laws referenced throughout the Informal Recommendations provided within this document. I understand that Commissioner Davis and I may still have differences in our interpretation of what is and is not legal today.
2. During my 3 year ordeal (and counting), I have witnessed and have been drastically impacted by a utility seeking to engage multiple government entities in collusion to enable and approve their irresponsible and illegal behavior. While it is certainly true that the Missouri State Statutes and Rules of the PSC are not as prescriptive as the laws in some states, I am reluctant to trust that new laws are necessarily the answer.
3. I am aware of attempts to attach amendments to proposed law within the past 3 years that would result in an either an exemption for or authorization of Aquila's illegally built SHPF.
4. I am also cognizant that the legislature relies heavily on input from the PSC when considering matters pertaining to the business of and laws impacting regulated entities.
5. I fear that even if new laws are enacted that I support in concept, regulated entities and perhaps the PSC may use it as an opportunity to act in ways that run counter to intention of the law given the fact that new laws have no associated court orders providing clarification and helping to establish the boundaries of comport under the law.

Recommended Statutory Change #2: Commission Membership and Attendance

Expand the number of Commissioners of the PSC so that committees of Commissioners are assigned to cases before the PSC. In addition to increasing the number of PSC Commissioners, the law or associated rules should include additional provisions which ensure that:

- a) A prescribed number of Commissioners (not less than 3) are in physical attendance or are attending via video conference all hearings and meetings related to a case
- b) That the presiding Regulatory Law Judge will call for questions of Commissioners attending via video conference just as if the Commissioner were physically present in the room, and
- c) That Commissioners must be in attendance (as indicated in “a”) a minimum of XX% of the time expended for all sessions (Pre-hearing Conference, Public Hearings, Hearings, etc) related to a case in order to be eligible to vote upon that case,
- d) The presiding Regulatory Law Judge or Court Reporter will make record of all time each Commissioner is in attendance during each part and for the entirety of the case. Records will be reviewed prior to voting on the matter and the Regulatory Law Judge will announce eligibility of each Commissioner to vote on the case.

Statements in Support:

1. Recommendation # 2 is presented due to a perception that the load of cases before the PSC may be such that Commissioners are unable to commit to full engagement in proceedings and that an informal approach has been implemented to “divide and conquer” the numerous cases. While it is certainly possible that such an approach has not been created, the fact is that during the hearings I’ve attended, many of the Commissioners are absent much of the time.
2. Quite honestly, it was very disturbing that multiple Commissioners appeared to be absent most of the time hearings were underway (of various types I’ve attended) during the last 3 years. Even if they were “observing” at their computer terminals, that is not the same as participating in the process and encourages “multi-tasking”, inattention, and reduced accountability for full, fair, and impartial review.
3. While I am required to take vacation to prepare, attend, and support my rights, it appears to me personally that the Commission places no or insufficient requirement on Commissioner attendance/participation in proceedings.
4. Over the course of the past 3 years and multiple hearings related to SFPF and Aquila Rate cases, many people assumed that the lack of attendance by some Commissioners coupled with pro-Aquila questioning of Interveners and Applicant during what little time they did participate signaled partiality toward private rather than public interests, and decision making based on incomplete/insufficient information.
5. While Chairman Davis indicated that he believes some provision requiring Commissioners to attest that they’ve read the full transcript of record of a case may be appropriate, I suggest that such an affirmation would not provide the level of confidence to the public that actual participation provides.

6. Expansion of the PSC and corresponding implementation of practices outlined in a) through d) above would significantly improve my faith in the Commissions ability to fulfill the obligation they have to fully support the workload of the Commission, allow full and meaningful participation, and afford all parties full and impartial decision making.

Appendix

The original intent was to embed documents providing context and additional details referenced in Court Orders, Report & Orders, Dissenting, Concurring Opinions, Testimony, and Exhibits of several relevant cases and other pertinent documentation. Due to Commission file size limits and EFIS posting recommendations, the majority of the Appendix information is presented embedded in separate word documents. The list below indicates what documents may be found in the lettered separate appendices.

Appendix A - Missouri Constitution and KC Star Article

- Missouri_constitution.pdf
- KC Star Guest Column 061706.pdf

Appendix B - PSC Case EO-2005-0156 – Transfer of Turbines, etc.

- EO-2005-0156 Clayton and Gaw Dissent.pdf
- EO-2005-0156 Report and Order

Appendix C - PSC Case EA-2005-0248 – Clarifying Order

- EA-2005-0248 Order Clarifying Prior Certificates.pdf
- Ea-2005-0248 Transcript Vol 4.pdf
- EA-2005-0248 Public Hearing.pdf
- Aquila psc stopaquila.app for rehearing.doc
- EA-2005-0248 Concur Opinion Jeff Davis.pdf

Appendix D - PSC Case ER-2005-0436 – Rate Case

- ER-2005-0436 Dissenting Opinion of Steve Gaw.pdf
- Rate Case Stipulation and agreement.pdf
- ER-2005-0436 Purchase Power Cheaper.pdf

Appendix E - PSC Case EA-2006-0309 – Site Specific Certificate

- EA-2006-0309 STOPAQUILA ORG brief.doc
- EA20060309AquilaSG RC Dissent.pdf
- EA-2006-0309 Concurring Opinion-Applying.pdf
- EA-2006-0309 Report and Order.pdf
- EA-2006-0309 Hearing Transcript-vol2.pdf
- PSC Testimony for EA-2006-0309-Julie Noonan.ppt
- Murray Hearing Transcript excerpts.doc
- Biz journal 2 06 06.pdf
- Kc star 02 09 06.pdf
- EA-2006-0309 CT Installation Chronology.pdf
- EA-2006-0309 Public Hearing Transcript-vol3.pdf
- Ea20060309 v7 Transcript.pdf

Appendix F - PSC Case EO-2005-0356 – Aquila Management Audit

- EO-2006-0356 Aquila Management Audit OPC Motion.pdf
- Biz journal 03017.pdf
- Kc star 03 17.pdf

Appendix G – Law Suits

CV104-1380cc – Original StopAquila law suit vs. Aquila

CV104-1443cc – Original Cass County vs. Aquila

- CV104-1443CC Motion in Opposition to Stay of Injunction.doc

WD64985 – Cass County vs. Aquila

- WD64985 Opinion.doc

06-CA-CV-01698 – Cass County vs. Missouri Public Service Commission

- DOC060714-Sept 06 Circuit Court StopAquila brief.pdf
- DOC061024 cass vs PSCAquila

WD67739 – Cass County vs. Missouri Public Service Commission

- STOPAQUILA PUBLIC version BRIEF Ct Appeals.pdf

Ethics Commission Case E6E12

Commissioner Appling announced during a recess of a PSC hearing that he launched a side career. He wrote a book and was soliciting speaking engagements. Other parties also allege that Commissioner Appling used PSC resources in support of his personal business. No documentation is provided here, however, Commissioner Appling failed to provide an accurate Financial Disclosure statement. After the complaint was filed, Commissioner Appling filed amended Financial Disclosure statement and received a letter from the Ethics Commission counseling him to file accurate and timely Financial Disclosure statements.